BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARCIAL J. MORALES Claimant	)	
VS.	)	
NATIONAL BEEF PACKING COMPANY Respondent	)	Docket No. 1,034,348
AND	)	
ZURICH AMERICAN INSURANCE CO. Insurance Carrier	)	

ORDER

Claimant requested review of the November 12, 2008 Award by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on February 10, 2009.

APPEARANCES

Scott J. Mann, of Hutchinson, appeared for the claimant. Shirla R. McQueen, of Liberal, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties agreed that the 5 percent permanent partial impairment to the whole body is not in dispute and can be summarily affirmed. The parties also agreed that if claimant is entitled to a permanent partial general (work) disability under K.S.A. 44-510e(a), that claimant's wage loss is 48.57 percent (based upon an imputed post-injury wage of $7.60 per hour, $304 per week).

ISSUES

The ALJ awarded claimant a 5 percent permanent partial disability but denied his request for a work disability as she concluded respondent's decision to terminate his employment was justified. Thus, claimant's recovery was limited to his functional impairment.

The claimant requests review of this decision alleging that respondent's decision to terminate him did not constitute good faith under present Kansas law and that he is entitled to a 60.95 percent work disability based upon a 48.57 percent wage loss and a 73.33 percent task loss.

Respondent argues that the ALJ should be affirmed in all respects. Respondent contends this case is analogous to the facts in *Ramirez*[1] in that claimant falsified his past medical history on his employment application. Given his untruthful disclosures, his termination was appropriate and as such, the ALJ's Award should be affirmed. Alternatively, should claimant be granted a work disability, respondent maintains Dr. Stein's task loss opinion was 46.7 percent rather than 73.33 percent, which yields a 47.64 percent work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact that are detailed, accurate and supported by the record. It is, therefore, not necessary to repeat those findings herein and they are adopted as if more fully set forth except as noted. Highly summarized, claimant was employed by respondent as a bone grinder, a position he held at an earlier employer's plant for 13 years. After being terminated from that job, claimant sought employment with this respondent. In connection with this application he completed a questionnaire which asked him about his employment history along with a series of health related questions.[2] Among them were two questions which are at issue here: One, "Have you ever had a serious illness/injury" and two, "Have you ever had any illness or injury that required the attention of a doctor during the past 5 years."[3] Claimant responded "no" to each of them.

---

[1] *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 889 (1999).

[2] The questionnaire claimant was given was in Spanish, claimant's native language. He speaks and writes little English. Translators were present during each interaction at issue in this claim.

[3] Claimant's Depo., Ex. 4 at 2 (medical questionnaire); Packard Depo. at 9.

Claimant was hired and worked as a bone grinder for a short period of time. On March 7, 2007, he injured his back in a compensable accident. After his injury and the filing of his claim, respondent's human resources representatives became suspicious[4] and began investigating claimant's disclosures on his questionnaire. It came to light that claimant had 5 separate accidents while at his earlier employer, the first accident was in 1994 while the last was in 2006. Not all of these accidents occurred within the last 5 years, and all but 2 were by all accounts minor. In each instance none of these accidents required permanent restrictions and from all the evidence in the file and respondent's testimony, it appears that none of those accidents would have precluded claimant's employment with respondent or altered his work assignments. Rather, the offending action was the fact that he answered "no" to the two questions above and when that was discovered, he refused to alter his answers and was summarily terminated. The individual who terminated him did not review the medical records associated with those claims and made no investigation into the facts and circumstances surrounding the events. She merely determined that claimant was untruthful in his answers and she fired him.

Claimant maintains that he did not intentionally mislead respondent during the hiring process. Instead, claimant explains that he did not view these previous accidents as "serious", nor did any of them prevent him from performing his job for respondent. While one or more of the accidents may have required a visit to a hospital, he did not know if those treating him were physicians or nurses. He merely did as he was told and reported for treatment as his employer directed. And even if there was some sort of failure on his part to accurately disclose his earlier medical history, claimant argues that the policy is, by its own terms, to be implemented with discretion. Termination is not the only solution - the respondent's policy indicates that termination "may" be the resolution.[5] Claimant argues that respondent's decision to terminate him under these circumstances demonstrated a lack of good faith on the part of respondent.

Respondent contends that claimant's failure to truthfully disclose his past medical history on this questionnaire constitutes a lack of good faith, and under the *Ramirez* decision, his termination was appropriate and justified as was the ALJ's decision to limit his recovery to his 5 percent functional impairment.

The ALJ found as follows:

> The claimant falsified his medical questionnaire with the knowledge that if discovered, he could be terminated. When the respondent discovered that there

---

[4] This suspicion stemmed from the fact that claimant was represented by Scott Mann, a lawyer that respondent's representatives were unfamiliar with and from the fact that claimant had been employed a relatively short time. None of these suspicions negate the fact that claimant's injury to his low back was compensable.

[5] Packard Depo. at 15-16.

> was false information contained on the questionnaire, the claimant was questioned and given an opportunity to explain the inconsistencies. The claimant did not change any of his answers or offer any explanation.[6]

The ALJ found that the claimant was not entitled to a work disability award, limiting his recovery to his functional impairment.

When, as here, an injured employee suffers a permanent partial general disability, the compensation due is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But Kansas Appellate Courts have grafted on an exception to this statute. In *Foulk*[7], the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*[8], the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage based on all the evidence before it. And it has also been held that after either returning or continuing to work following an injury, a worker must also make a good faith effort to retain that employment or a wage will be imputed for purposes of the wage loss prong of the permanent partial general disability formula.

---

[6] ALJ Award (Nov. 12, 2008) at 6.

[7] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[8] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

The good faith concept was also used in *Ramirez*[9] to deny an injured employee a work disability when he was terminated from his employment for falsifying his pre-employment application. In *Ramirez*, the claimant was terminated for failing to disclose on his employment application a prior workers compensation claim involving his back. The Court of Appeals concluded (with very little analysis) that claimant was entitled to only a functional impairment based upon his failure to disclose his earlier workers compensation injury.

It is in this case that respondent relies on *Ramirez* to justify its termination and deny claimant any work disability recovery. In essence, respondent desires the Board to limit its inquiry into whether or not respondent terminated claimant for violating company rules. The Board, however, concludes the inquiry is more broad. The appropriate test is whether claimant made a good faith effort to retain his employment with respondent and, therefore, company policy is only one factor to be considered in that analysis. Furthermore, good faith is likewise required of a respondent in its dealings with claimant. For example, in *Niesz*[10] an employer's decision to terminate an injured employee did not preclude an award for work disability when the employer failed to conduct an investigation into the circumstances surrounding the customer complaints against the employee.

The Board has carefully considered the evidence and finds the ALJ's decision to limit claimant's recovery to his functional impairment should be reversed. The questions contained on the questionnaire are sufficiently vague so as to include a variety of conditions that are wholly irrelevant to respondent's potential employment decisions. Regardless of the source or severity of the injury, if an employee consults with a doctor and fails to disclose that fact, George Hall testified that the employee would be fired. Thus, it would appear that contrary to the disclaimer on the questionnaire, there is a zero tolerance policy at work in the plant. This means that if an injured employee sought treatment for a cold, pneumonia or some other personal condition and does not disclose this fact, termination is possible or maybe even inevitable. What is "serious" to one may not be to another. Add to that the language and educational barrier at work in this claim, the result is an inevitable measure of confusion.

More to the point, respondent's representatives did not review the medical records which were provided by claimant's earlier employer. That alone would have shed light on the circumstances surrounding the accidents and would have reinforced claimant's contention that the accidents did not yield "serious" injuries. It is clear from this record that once claimant, who had worked there only a few months, filed his claim using a lawyer that respondent was unfamiliar with, respondent was suspicious. Once claimant refused to

---

[9] *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 889 (1999).

[10] *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999); See also *Guiterrez v. Dold Foods, Inc.*, No. 99,535 (KS. Ct. of Appeals Decision filed Jan. 16, 2009); *Langel v. Brighton Gardens & Ins. Co.*, No. 98,684 (KS. Ct. of Appeals Decision filed Aug. 1, 2008).

back away from his initial answers, which he viewed as truthful, he was terminated. This decision to terminate him was done with little investigation other than to identify claimant's earlier accidents and then verbally re-ask the same questions during an interview in an attempt to establish his misstatements. The Board finds the "cause" for this termination to be less than compelling under these facts. Respondent had the medical records in its possession. The previous accidents had no impact upon his subsequent job duties with respondent and did not contribute in any way to his present impairment.

The Board finds this claim is governed by the principles set forth in *Niesz* and recognizes that since *Ramirez*, the focus of good faith goes beyond just the claimant's actions but to the respondent's as well, taking into account the entirety of the factual situation.[11] Accordingly, the ALJ's Award is modified to grant claimant a permanent partial general (work) disability. The parties agreed claimant's wage loss was 48.57 percent. Dr. Stein testified that claimant's task loss was 73.33 percent. However, upon review of a video, he modified that opinion to 46.7 percent. When averaged, this yields a work disability of 47.63 percent and the Board finds the Award should be modified to reflect the 47.63 percent work disability.

The balance of the Award is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated November 12, 2008, is affirmed in part and modified in part as follows:

The claimant is entitled to 20.75 weeks of permanent partial disability compensation at the rate of $394.12 per week or $8,177.99 for a 5 percent functional disability followed by 176.91 weeks of permanent partial disability compensation at the rate of $394.12 per week or $69,723.77 for a 47.63 percent work disability, making a total award of $77,901.76.

As of March 6, 2009 there would be due and owing to the claimant 83.18 weeks of permanent partial disability compensation at the rate of $394.12 per week in the sum of $32,782.90 for a total due and owing of $32,782.90, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $45,118.86 shall be paid at the rate of $394.12 per week for 114.48 weeks or until further order of the Director.

---

[11] See e.g. *Rash v. Heartland Cement Co.*, 37 Kan. App. 2d 175, 154 P.3d 15 (2006); *Bohanan v. USD No. 260*, 24 Kan. App. 2d 362, 947 P.3d 440 (1997).

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

IT IS SO ORDERED.

Dated this _____ day of March 2009.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

DISSENT

The undersigned Board Member respectfully dissents from the majority's opinion. This Board Member would apply the *Ramirez* rationale and limit claimant's recovery to the 5 percent functional impairment. Claimant's failure to disclose his earlier injuries is, like the employee in *Ramirez*, a justifiable reason to terminate his employment. Claimant lost his employment as a result of his own actions and he should not be able to profit from those actions.

_____
BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Shirla McQueen, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge